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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 184

ARKANSAS VALLEY G & T, INC., ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–15a) is reported at 391 F. 2d 470. The opinions of the Federal Power Commission (Pet. App. 17a–25a) are reported at 37 FPC 68, 495.

JURISDICTION

The judgment of the court of appeals was entered February 15, 1968. A timely petition for rehearing was denied March 14, 1968 (Pet. App. 16a). The petition for a writ of certiorari was filed on June 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether REA-financed cooperatives engaged in the transmission of electric energy in interstate commerce or its sale at wholesale for resale in interstate commerce are subject to the regulatory authority of the Federal Power Commission as "public utilities".

STATUTE INVOLVED

Sections 3 and 4 and portions [1] of Parts II and III of the Federal Power Act, 41 Stat. 1063, 16 U.S.C. 791a, *et seq.*, as amended, are set forth in part in the petition, App. 25a–38a.

STATEMENT

Petitioners seek review of a decision of the Court of Appeals for the District of Columbia Circuit affirming the order of the Federal Power Commission denying the application of nine of 13 member-owners—who are the only customers—of Colorado-Ute Electric Association, Inc. ("Colorado-Ute"), which asked that the Commission assert jurisdiction, under the Federal Power Act, over Colorado-Ute as a "public utility."

THE BACKGROUND

Colorado-Ute, a non-profit cooperative association organized under the laws of Colorado, and financed in large part with loans obtained from the Rural Electrification Administration, is engaged in the generation, transmission and interstate sale of electric

[1] Sections 201, 202, 205–207, 306, 307, 309, 311, 314–317.

energy at wholesale to its members who are themselves engaged in the distribution and sale of electric energy to their customer owners in five western states. Twelve of the 13 constituent members are non-profit REA cooperatives; the thirteenth, Salt River Project Agricultural Improvement and Power District ("Salt River"), is a quasi-governmental arm of the State of Arizona.

Colorado-Ute originally sold electric energy to four distribution cooperatives. The power was supplied by a steam electric generating plant constructed in 1959, and supplemented by energy bought from the United States Bureau of Reclamation (J.A. 23–24).[2] Between 1960 and 1962, the other member-owners contracted to purchase power from Colorado-Ute (J.A. 32–35, 40). The energy was, in substantial part, to be supplied by a 150,000 kw steam generation plant at Hayden, Colorado. The plant and related facilities were completed in 1965.

These facilities were constructed under a certificate of public convenience and necessity issued by the Colorado Public Utilities Commission in 1963.[3] The project was financed by an advance of approximately $10 million from Salt River (to be repaid by deliveries of electric power) and a 35-year 2 percent loan of nearly $23 million obtained from the REA (J.A. 14, 22–23). On February 14, 1966, after the facilities were completed and placed into operation, the Colorado Supreme Court directed the setting aside of the

[2] "J.A." refers to the pages of the joint appendix in the court of appeals.

[3] *Re Colorado-Ute Electric Association, Inc.*, 48 PUR 3d 113.

State Commission's certificate order, and Colorado-Ute unsuccessfully sought a review of the State Court's action by this Court.[4]

THE PRESENT PROCEEDINGS

While Colorado-Ute's certiorari petition was pending in this Court, its members, including the present petitioners, filed a "friendly" complaint against Colorado-Ute with the Federal Power Commission, alleging that the Commission has plenary jurisdiction over Colorado-Ute and seeking nullification of the State Court's decision requiring cessation of the Hayden plant operations (J.A. 2–20).[5] In its answer, Colorado-Ute requested a determination of whether it is a "public utility", and conditionally offered to file all of its rate schedules with its members and the contracts relating to them (J.A. 25–28).

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[4] *Western Colorado Power Company* v. *Public Utilities Commission*, 411 P. 2d 785, certiorari denied *sub nom. Colorado-Ute Electric Association* v. *Western Colorado Power Co.*, 385 U.S. 22. No challenge was made in that proceeding to the jurisdiction of the Colorado Commission.

[5] The complaint also prayed that the Commission assert Section 205 (rate regulation) and Section 309 (administrative powers) jurisdiction; that it investigate power pool and interconnection transmission facilities and require Colorado-Ute to continue to serve and to maintain such connections; that it inquire into the adequacy of service under Section 207 and the impact of abandonment of the Hayden facilities; that it conduct investigations under Sections 306 and 307; that it require Colorado-Ute to continue operations permanently under 202(c) notwithstanding the decision of the Colorado Supreme Court; and that it institute an appropriate suit in the federal district court under Sections 314, 316 and 317 to require continued operation of the Hayden plant.

The Commission (Pet. App. 17a–22a), relying on its decision of one day earlier in *Dairyland Power Cooperative,* 37 FPC 12, held that Colorado-Ute, as a cooperative financed in part by the REA, was not a public utility subject to its jurisdiction.[6] In *Dairyland,* the Commission had held, on the basis of the legislative histories of both the Federal Power Act and the Rural Electrification Act of 1936, the numerous subsequent Congressional expressions and the consistent interpretations of both agencies over a 30-year period, that Congress had not intended to include REA-financed cooperatives among the "public utilities" which are subject to the Commission's general regulatory authority. As an alternative ground for its decision, the Commission ruled that REA cooperatives are instrumentalities of the United States which, under Section 201(f) of the Power Act, are exempt from its regulation.

The court of appeals affirmed, holding that in view of the legislative and administrative history, the Commission had correctly interpreted the phrase "public utilities" as used in the Power Act.[7] It did not pass

[6] The Commission ordered that the rate schedules be returned to Colorado-Ute. It did not dismiss the allegations which asserted that the Commission's emergency powers under Section 202(c) of the Act might apply if service from the Hayden plant and related facilities was discontinued, inasmuch as the exercise of those powers was not limited to "public utilities" as defined in Section 201.

[7] Shortly after argument before the court of appeals, the Colorado Public Utilities Commission on December 22, 1967 (*Colorado Ute Electric Assoc.*, Decision No. 70608, not yet reported), entered an order authorizing Colorado-Ute to operate and maintain its Hayden plant. The court of appeals ruled (Pet. App. 3a) that this case had not become moot.

on the Commission's conclusion that such cooperatives are federal instrumentalities.[8]

ARGUMENT

The court of appeals properly affirmed the Commission's decision that REA-financed rural electric cooperatives are not subject to the Commission's jurisdiction as "public utilities" under the Federal Power Act. While the jurisdictional question involved has evoked considerable interest, and a contrary holding would have had a broad potential impact on the operations of such cooperatives, the decision below is correct and there is no conflict among the circuits. Moreover, no need has been demonstrated for the broad jurisdiction with which petitioners would invest the Commission, although the Commission has requested limited controls over cooperatives under the proposed Electric Reliability Act. In these circumstances further review is unwarranted.

1. In its opinion in *Dairyland,* the Commission rested its conclusion that the Federal Power Act does not grant it jurisdiction over REA-financed cooperatives largely on the legislative history, which shows that Congress, in giving the Commission jurisdiction

[8] Subsequently, in *City of Paris* v. *Federal Power Commission*, C.A.D.C. No. 21,375, decided July 3, 1968, the court of appeals held that REA cooperatives are not federal instrumentalities. There the Commission, relying on its *Dairyland* conclusion that REA-financed cooperatives are federal instrumentalities, held that it could not compel a public utility to transmit energy from an REA-financed cooperative to a third party customer because it could not order transmission on behalf of government instrumentalities under Part II of the Power Act.

over "public utilities"[9], focused entirely upon "privately-owned companies which held themselves out to render a public service", and designed the statute "to prevent the notorious investment and profit abuses which had developed in the [electric] industry under the domination of the holding companies." 37 FPC at 15; Pet. App. 10a–11a. The REA was created by Executive Order No. 7037, a few months before the Power Act was adopted. Shortly after the adoption of the Power Act, Congress passed the Rural Electrification Act of 1936 in order to foster a means of bringing electric power to vast rural areas not being served by investor-owned or municipal electric systems, Pet. App. 5a–6a. This was to be accomplished largely by providing low cost loans to cooperatives especially organized to provide, and limited to, such operations. In administering these loans, the Administrator of the REA exercises extensive supervision and control over the REA-financed electric cooperatives. (Pet. App. 6a.) [10] As the court below observed

[9] Under Part II of the Power Act the Commission's jurisdiction depends upon whether there is transmission of electric energy in interstate commerce or the sale of electric energy at wholesale in interstate commerce by a "public utility." See Section 201.

[10] As the court of appeals recognized the cooperatives are effectively self-regulating as to their rates (Pet. App. 6a) since members are at the same time their customers.

There are instances of bulk sales by cooperatives to nonmembers (such as the provision for the sale of surplus energy to an investor-owned utility under the agreement which Colorado-Ute has made with Public Service Company of Colorado). But these sales produce a minor portion of the cooperatives' operating revenues. Cooperatives, to satisfy their needs, indeed must purchase substantial amounts from others. In 1967, they generated as a group only 23.3 percent of their total energy input

(Pet. App. 11a), "[t]he two Acts were aimed at wholly disparate problems and the supervisory agencies established under them were to deal with fundamentally different sorts of utilities."

The issue here, to be sure, falls within the interstices of the language of the two statutes. The overall design is, nevertheless, clear. Broad, general jurisdiction of the REA cooperatives has been given the REA Administrator, as the FPC's approach of 30 years has recognized.

The result of petitioners' construction of the Power Act would be to give two separate federal agencies overlapping control over one portion of the electric utility industry, see 37 FPC at 21–22, even though neither Act makes provision for resolution of the conflicts that would be the necessary end product of such dual jurisdiction. As the court below concluded (Pet. App. 12a), "this apparent indifference indicates that those entities under the Administrator's jurisdiction—the REA-financed cooperatives—were not intended to fall within that of the

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and purchased 32.7 percent from power companies, 37.1 percent from federal agencies, and 6.9 percent from other public agencies. REA Bulletin 111-2, *29th Annual Report of Energy Purchased by REA Borrowers*, at 7 (1968). The Department of Agriculture advises us that in 1967 only 6.1% of the total revenues of $177,272,715 received by 41 REA cooperatives was derived from sales to non-members. About half of this amount was obtained from sales to investor-owned utilities under exchange agreements required to be filed with the Power Commission and subject to its rate jurisdiction over such utilities.

Commission. If anything the emphasis in Congress was on the Administrator's need for 'almost unlimited discretion' and 'extraordinary power' if he were to oversee effectively the rural electrification program."

2. There is not, as petitioners contend (Pet. 15–17), a conflict in decisions that this Court should resolve. The only question decided below is that an REA cooperative is not subject to the general jurisdiction of the Federal Power Commission as a "public utility". We are aware of no court decision other than the present one involving this question.[11]

The conflict petitioners assert goes only to the question whether an REA cooperative is an "instrumentality" of the United States. The Commission's affirmative response provided but an alternative ground for its decision here, and the court of appeals did not reach the issue. There would be no need to consider the question upon a grant of certiorari unless the Court concluded that an REA cooperative is a "public utility" within the meaning of the Power Act.

[11] There is no inconsistency between the Commission's decision here and its order in *Buckeye Power Co., Inc.*, Docket No. E–7355, August 4, 1967 (not yet reported). Buckeye is *not* an REA-financed cooperative. In that case, the Commission was requested to, and did, allow Buckeye to enter into the sort of private financing arrangement that is not used by REA-financed systems. Buckeye is a cooperative all of whose shareholders are themselves REA cooperatives. But this fact does not subject Buckeye to any more supervision by the Rural Electrification Administration than those private utilities which sell to REA cooperatives and are, in the large, subject to FPC regulation.

Thus; the conflict—if there be one [12]—need not be resolved to dispose of this case.

3. The gravaman of this proceeding was the Colorado Supreme Court's ordered cancellation of a Colorado Commission certificate approving Colorado-Ute's construction of a large thermal generating plant at Hayden, Colorado. Prior to the court decision, the plant had been built and put into operation and much of the energy generated was being sold at wholesale in interstate commerce. The petitioners apparently hoped, as the court below noted (Pet. App. 3a, n. 3), that assertion of Federal Power Commission jurisdiction over Colorado-Ute as a public utility would render the Colorado certificate nugatory. Since the Commission has no authority to certificate steam generating facili-

[12] The Fifth and Ninth Circuits have expressed differing views on this issue but in cases not involving the FPC. Compare *Alabama Power Co.* v. *Alabama Elec. Coop.*, C.A. 5, No. 23016, decided April 2, 1968 (antitrust suit by private utility seeking to enjoin REA loan to a cooperative; characterization of cooperative as "federal instrumentality" was alternative ground for dismissal), *with City of Anchorage* v. *Chugach Elec. Ass'n.*, 252 F. 2d 412 (C.A. 9) (REA-financed cooperative not immune from local taxation).

Only *City of Paris* v. *Federal Power Commission*, C.A.D.C. No. 21375, decided July 3, 1968, considers whether an REA cooperative is a federal "instrumentality," as that word is used in the Power Act. There, the Commission declined to direct an investor-owned utility to transmit power from an REA cooperative to a third party customer on the ground that it could not compel transmission from a government instrumentality. The issue on which the instant case was decided—whether or not such a cooperative is a "public utility"—was entirely irrelevant under the applicable provision of the Power Act, Section 202(b).

ties, it is far from clear that an assertion of jurisdiction here would have achieved petitioners' objective.[13]

Whatever may be the need for more extensive federal regulation of REA cooperatives, it is not clear that the FPC should have the broad jurisdiction with which petitioners would vest it. As the Commission recognized in *Dairyland,* 37 FPC at 27–28, regulatory controls not now provided in the Power Act would be desirable in order to promote new mechanisms for regional and national coordination of bulk power systems involving the interaction of generation and transmission facilities regardless of the nature of their ownership.

But the route to that end is not through interpreting the Power Act in a manner that conflicts with the statutory scheme of giving the REA basic authority over REA-financed cooperatives. It is through further legislation, such as the pending bills which the Commission has endorsed,[14] that existing mechanisms for the coordination of electric utility systems may be strengthened. Significantly, the authority sought under that proposal does not require the unlimited exercise by the Commission of extensive regulatory authority over REA-financed cooperatives, as petitioners here urge, which would lead to duplicative and confining supervision.

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[13] Nor is the need for Commission jurisdiction shown by reference to the *Tri-State* case, now pending before the Tenth Circuit (see Pet. 7, n. 8), which petitioner contends involves a conflict of jurisdiction among State regulatory commissions over an REA-financed cooperative that only federal regulation can solve. The court of apepals has not yet decided the *Tri-State* case, and its outcome cannot be foretold.

[14] See the proposed Electric Power Reliability Act of 1967, S. 1934, 90th Cong., 1st Sess. The identical bill was introduced in the House as H.R. 10727, 90th Cong., 1st Sess.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1968.

U. S. GOVERNMENT PRINTING OFFICE: 1968